76-1501

No._____

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In The Supreme Court of The United States

OCTOBER TERM, 1976

ROBERT GENE INGRAHM,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

ROBERT GENE INGRAHM,

PETITIONER,

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Robert Gene Ingrahm, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 4, 1977.

OPINION BELOW

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit is contained in an unreported memorandum entered on

February 4, 1977. A copy of said opinion is attached as Appendix A. The order of that court denying a petition for rehearing and rejecting the suggestion for a rehearing en banc, entered on March 28, 1977, is attached as Appendix B.

JURISDICTION

On February 4, 1977, the United States Court of Appeals for the Ninth Circuit entered a judgment affirming petitioner's conviction for violating Title 21, United States Code, Section 841(a)(1) and 952(a). Petition for rehearing and suggestion for rehearing en banc was filed with the Court on February 16, 1977 and denied on March 28, 1977.

The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the search warrant issued in the instant case was supported by a sufficient

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affidavit.

2. Whether the government agents exceeded the scope of the warrant.

3. Whether petitioner was denied the effective assistance of counsel by his trial counsel's failure to raise said issues prior to or during trial.

4. Whether petitioner was denied effective assistance of counsel and compulsory process of witnesses by his trial counsel failing to procure alibi witnesses.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation;

and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On November 20, 1975, a complaint was filed against the appellant in the District of Nevada charging him with violating Title 21, United States Code, section 841(a)(1). Appellant was subsequently indicted by the Federal Grand Jury and charged with violating Title 21, United States Code, sections 952(a) and 841(a)(1). No pre-trial motions were filed by appellant's trial counsel. On August 16, 1976, appellant

waived his right to a trial by jury. On August 18, 1976, court trial commenced before the Honorable Roger D. Foley. On August 20, 1976, appellant was found guilty of both counts.

On September 17, 1976, appellant substituted Kevin J. McInerney as his attorney in place of Arthur Lewis, Esquire and Harry Claiborne, Esquire, appellant's counsel prior to and during trial. On September 23, 1976, appellant's new counsel filed an affidavit indicating that he had just been retained and required a ten day continuance of sentencing to evaluate the merits of filing a motion for new trial based on certain specified grounds, e.g. failure of trial counsel to subpoena witnesses or to move to suppress evidence. The prosecutor consented to a stipulation continuing the sentencing, but the trial judge refused to approve it.

On September 24, 1976, appellant's new counsel, Kevin J. McInerney, orally moved for a

new trial and a continuation of the sentencing. At that time, Judge Foley deemed appellant's motion to be filed and denied. Appellant was sentenced to five years in the custody of the Attorney General as to Count One as well as a special parole term of five years. As to Count Two appellant was also sentenced to five years imprisonment as well as a special parole term of five years, the term of actual custody to run concurrently. The judgment of the Court was filed on September 30, 1976. On October 4, 1976, appellant's counsel filed a written motion for a new trial.

STATEMENT OF RELEVANT FACTS

On November 4, 1975, the Drug Enforcement Administration (D.E.A.) obtained a court order permitting them to install an aircraft "transponder" or transmitter on a Cessna Aircraft, Model 180 in order to track and locate the aircraft. The order was granted upon the affidavit of D.E.A. Agent David Shaw. The

affidavit stated that the appellant had been seen flying the aircraft and on one occasion was followed into Mexico. On November 4, 1976, the Agents of the D.E.A. and Customs officers entered the Long Beach Airport at 11:30 p.m. to install the transponder on the aircraft in question. The agents entered the locked aircraft and installed the transponder behind the instrument panel. In order to accomplish this, the government agents were required to remove the upholstered panel held in place by screws.

On November 11, 1975, the Federal Aviation Radar Control Center made contact with the aircraft as it came out of Mexico and tracked it northward to the vicinity of Blythe, California. The Radar Center lost contact with the plane near Searchlight, Nevada. Subsequently the craft was located about fifteen miles south of Searchlight by a D.E.A. aircraft where it had apparently crashed. The appellant was later identified by hunters in the area as the one who

came from the vicinity of the crashed aircraft.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit Court of Appeals analogized the placement of the transponder in the aircraft to the placement of a beeper in an automobile which was considered in United States v. Hufford, 539 F.2d 32 (9th Cir. 1976). The Hufford court reasoned that the electronic beeper was "merely" a more convenient and reliable means of ascertaining the location of a suspect as he drove along a public road. Id at 34. The Hufford court approved the installation of the tracking device without a warrant and rejected the idea that Hufford's reasonable expectation of privacy was to be assessed in light of his movements along the public highways; instead the court focused upon a person's reasonable expectation to be free from having a tracking device installed in hidden places in articles of property which belong to or are in the possession of the person when the

installation is made.

In United States v. Pretzinger, 542 F. 2d 517 520 (9th Cir., 1976), an electronic tracking device was attached to an airplane pursuant to a warrant authorizing the installation. The Court of Appeals concluded that defendant's reasonable expectation of privacy was not to be judged in light of his movements through the public airspaces. In discussing the need for a warrant, the court suggested that no warrant is needed to justify the installation of an electronic tracking device if Fourth Amendment rights are not violated in order to initially install the device. Id at 520. Likewise, the Hufford court also noted that if the placement of the tracking device was to be constitutionally validated no Fourth Amendment violations could have occurred when the device was installed. United States v. Hufford, supra at 34. Even if the Ninth Circuit view that no constitutional protection is afforded movement

along public roads and airspaces is accepted, and the contrary Fifth Circuit view is rejected, see United States v. Holmes, 521 F.2d 859 (5th Cir., 1975); affirmed en banc, 537 F.2 227 (5th Cir., 1976); a valid court order would still have been needed to enter the locked hanger and aircraft in order to install the device.

In the instant case the affidavit in support of the warrant did not meet the tests promulgated by this court. See Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 104 (1964). (A copy of the Application and Order is attached as Appendix C.) There is no adequate indication as to the source of the information or the reliability of prior arrest or tracking information relayed to the government agent by the Brackett Field Control Tower. Thus, there is no showing of the personal knowledge or reliability justifying the issuance of the warrant. Even if one could have no reasonable expectation of privacy while flying

an aircraft beyond the borders of the United States, the petitioner did have a valid expectation of privacy in locking his aircraft within the hanger. If the placing of the transponder in the aircraft is not classified as a search within the meaning of the Fourth Amendment, a search did occur though, when the hanger was entered and the aircraft broken into to install the transponder. Because the petitioner had a reasonable expectation of privacy, see Katz v. United States, 389 U.S. 347 (1967), a valid search warrant, which did not exist, was required to install the transponder.

2. If the court order allowing the government to install the transponder is considered valid, the government agents exceeded the scope of the warrant. The affidavit, as well as the court order authorizing the use of the transponder, speak only of entering an aircraft hanger to install the transponder on the aircraft. The order and affidavit say nothing about

entering a locked aircraft and removing portions of interior paneling to install the transponder. Furthermore, in the affidavit it was stated that it was necessary to enter the hanger to install the transponder and that the "lessor of this hanger would provide entry." In petitioner's motion for a new trial, counsel, in his affidavit, noted that he was able to locate the manager of the company which was the lessor of the hanger in question. The manager would have testified that neither he nor anyone in authority was ever contacted concerning granting of permission to enter the hanger.

The Hufford and Pretzinger courts placed Fourth Amendment limitations on the authority to install tracking devices on movable vehicles. If the Ninth Circuit's trend to allow the government to survey its citizens beyond the borders through the use of sophisticated tracking devices is condoned by this court, and the Fifth Circuit stand rejected, this court should at

least require the Ninth Circuit to adhere to its own guidelines. Fourth Amendment violations occurred when government agents entered the hanger and broke into the aircraft by exceeding the scope of the warrant. The Fourth Amendment protections would be almost completely negated if the government is allowed to ignore its requirements in order to carry out an activity which is, at this stage, only arguably constitutional. Due to the unique capabilities of modern electronic tracking devices, the guidelines of the Fourth Amendment must be followed to avoid abuse of such devices.

3. None of the above issues were raised by petitioner's trial counsel. The Ninth Circuit Court of Appeals considered the above Fourth Amendment arguments to be without merit, thus upholding the denial of his motion for a new trial. See Appendix A. Petitioner submits that such issues are not without merit and petitioner was denied his Sixth Amendment right to effective

assistance of counsel, See McMann v. Richardson, 397 U.S. 759 (1970).

4. Petitioner's Sixth Amendment guarantees were also ignored by the trial court in that he was not allowed to avail himself of compulsory process of witnesses in his favor. Petitioner's trial counsel did not even attempt to procure alibi witnesses which would have testified on behalf of the petitioner. Petitioner's new counsel, Kevin J. McInerney, was able to locate such witnesses with only a few days investigation. Such testimony would have gone directly to the issue of guilt or innocence but the trial court refused to even hear the testimony of these witnesses. The Ninth Circuit Court of Appeals considered such evidence as no more than cumulative. See Appendix A. The witnesses would have placed the petitioner in the Los Angeles area when the airplane crashed in Nevada. This is not cumulative evidence, even within the confines of United States v. De Palma,

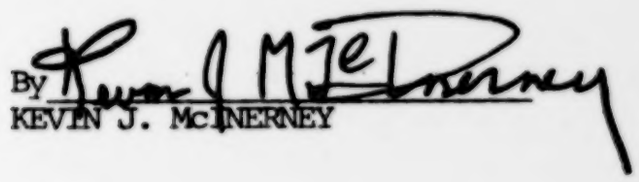
401 F.2d 240 (9th Cir., 1972), which was relied upon by the Ninth Circuit in its opinion.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the issues herein present substantial questions arising under the Fourth and Sixth Amendments and that a writ of certiorari should issue to review the opinion of the lower court.

DATED: April 20, 1977

Respectfully submitted,

By 
KEVIN J. McINERNEY

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	NO. 76-3339
vs.	)	
	)	MEMORANDUM
ROBERT GENE INGRAHM,	)	
	)	
Defendant-Appellant.	)	

[February 4, 1977]

Appeal from the United States District Court
for the District of Oregon

Before: HUFSTEDLER, SNEED, and KENNEDY,
Circuit Judges.

The sole issues on this appeal relate to appellant's claim that his trial counsel was constitutionally inadequate because (1) he failed to move to suppress evidence, and (2) he failed to interview and to call certain alibi witnesses. We are satisfied that counsel was not constitutionally inadequate.

Appellant contends that his counsel was constitutionally inadequate for failure to move

to suppress on the ground that the Government, in violation of the Fourth Amendment, had caused a transponder to be placed in the aircraft, pursuant to a court order. Although we could not dismiss a Fourth Amendment argument as legally frivolous, any possibility of success on the merits of the argument is extremely remote. The placement of the transponder in the aircraft was analogous to the placement of the beeper in the automobile, which was considered in United States v. Hufford, 539 F.2d 32 (9th Cir. 1976). We decline to hold that counsel is constitutionally ineffective if he fails to present a Fourth Amendment argument in support of a motion to suppress which, at best, has only slight merit.

We are not persuaded on the basis of the record before us that counsel was in any respect ineffective by reason of his failure to interview and call certain alibi witnesses. The evidence against appellant was strong, and, as far as we can ascertain from the record, the

alibi witnesses in question could have been no more than cumulative. (United States v. De Palma, 461 F.2d 240 (9th Cir. 1972).)

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	NO. 76-3339
	)	
v.	)	ORDER
	)	
ROBERT GENE INGRAHM,	)	
	)	
Defendant-Appellant.	)	

BEFORE: HUFSTEDLER, SNEED, and KENNEDY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX "C"

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE A 1952 CESSNA AIRCRAFT MODEL 180 SERIAL NO. 31427 WHITE WITH GREEN TRIM, BEARING FAA REGISTRATION NO. N4528B	MISC. NO. 4988 APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE USE OF A PHYSICAL SURVEILLANCE AID; AFFIDAVIT OF DAVID P. SHAW; ORDER

The United States, through its attorneys, hereby moves for an Order authorizing the use of an aircraft transponder and a tracking beacon as a physical surveillance aid for thirty days in an investigation of offenses committed by Robert Ingrahm and possibly others using the above

aircraft in violation of Title 21, United States Code, Section 952.

This Motion is based upon the affidavit of David P. Shaw, Special Agent of the Drug Enforcement Administration, Department of Justice.

Respectfully submitted,

WILLIAM D. KELLER
United States Attorney

ERIC A. NOBLES
Assistant U.S. Attorney
Chief, Criminal Division

VINCENT M. VON DER AHE
Assistant U.S. Attorney

I hereby attest and certify on 8/16/76 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk U.S. District Court
Central District of California
By Shelley Bulian, Deputy

AFFIDAVIT OF DAVID P. SHAW

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I, DAVID P. SHAW, being duly sworn, depose and say:

That I am a Special Agent of the Drug Enforcement Administration, Department of Justice, assigned to the Los Angeles Regional Office, Air/Marine Detail. I have been a Special Agent for five years and have specialized in narcotics investigations involving smuggling by aircraft for the past five years.

On or about April 9, 1974, Robert Gene Ingrahm was arrested at El Carano Airport in Quiedo, Colombia, South America, with approximately two pounds of cocaine. Ingrahm had just flown into Quiedo from Cali, Colombia, in a private aircraft, FAA registration no. N4528B. Upon inspection of the private aircraft by Colombian officials, Ingrahm was found to have the two pounds of cocaine in the aircraft hidden

inside a suitcase.

On October 20, 1975 at approximately 3:05 p.m., aircraft N4528B, flown by Robert Ingrahm, departed Brackett Field, La Verne, California. The suspect aircraft was tracked by FAA radar from Ontario and Los Angeles from La Verne, California, to an area approximately thirty miles south of Coyote Wells, a city on the United States/Mexico border. The aircraft disappeared from radar approximately thirty miles into Mexico.

U.S. Customs alerts were initiated to all the ports of entry along the United States/ Mexico border with instructions to notify Special Agent Jensen of U.S. Customs or Special Agent Shaw of the Drug Enforcement Administration upon aircraft N4528B's formal reentry into the United States.

On October 23, 1975 at approximately twelve noon, FAA tower at Brackett Field informed Special Agent Shaw that N4528B had just landed at

their field and the aircraft was parked inside hangar A-10 at Brackett Field. Subsequent check with Border Patrol and U.S. Customs failed to disclose any legal border crossings for N4528B or Robert Ingrahm.

On October 29, 1975 at approximately 1:05 p.m., Ingrahm, flying N4528B, departed Brackett Field. U.S. Customs aircraft followed the suspect aircraft south, crossing the United States/Mexico border approximately twelve miles east of Jacumba, California. The suspect aircraft was followed approximately two hundred miles into Mexico and was observed to land at a dirt strip at San Luis Gonzaga Baja, Mexico at approximately 3:45 p.m.

The aircraft remained at this location until approximately 5:30 a.m. on October 30, 1975, when it departed the area and was visually lost.

On October 31, 1975 at approximately 10:00 a.m., Special Agent Shaw observed the suspect aircraft parked at Long Beach Airport.

Special Agent Shaw took custody of what appeared to be marijuana debris that was found inside the aircraft. The debris was forwarded to the Drug Enforcement Administration Laboratory.

At approximately 11:30 a.m., Special Agent Shaw notified U.S. Customs and learned that N4528B had not made a legal crossing into the United States.

It is necessary to enter an aircraft hangar in which the aircraft is kept in order to install the aircraft transponder. The lessor of this hangar would provide entry.

_____
DAVID P. SHAW
Special Agent, Drug
Enforcement Administration

Affiant.

SUBSCRIBED and SWORN to before me
this 4th day of November, 1975

_____

O R D E R

Upon the motion of the United States of America, and the affidavit of David P. Shaw, Special Agent of the Drug Enforcement Administration, Department of Justice, and full consideration having been given to the matter, the court finds:

a. That there is reason to believe that Robert Ingrahm has committed and is committing violation of Title 21 United States Code, Section 952, involving the unlawful importation of controlled substances.

b. That there is reason to believe that a 1952 Cessna Aircraft, Model 180, Serial No. 31427, white with green trim, bearing FAA Registration No. N4528B, is being used to facilitate the commission of the above described offense by Robert Ingrahm.

IT IS THEREFORE ORDERED THAT OFFICERS OF

THE DRUG ENFORCEMENT ADMINISTRATION, DEPARTMENT OF JUSTICE, are authorized to:

1. Install an aircraft transponder and tracking beacon on a 1952 Cessna Aircraft, Model 180, Serial No. 31427, white with green trim, bearing FAA Registration No. N4528B, which will aid physical surveillance operations to track the direction and locate the ultimate destination of the plane authorized in the above-described offense.

IT IS FURTHER ORDERED that this authorization to install and operate the directional radio beacon as a physical surveillance aid must terminate upon the conclusion of the investigation of the above offense, or in any event at the end of thirty days from the date of this Order; and

IT IS FURTHER ORDERED that this Motion, Affidavit and Order are hereby sealed and shall remain in the custody of the Court until the time set for expiration of the authorization for the use of said surveillance aids as set forth above.

DATED: This 4 day of November, 1975.

UNITED STATES DISTRICT JUDGE